184 (2)

No. 10-1028

Supreme Court, U.S.
FILED
MAR 18 2011
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JAMES T. PANAGOS, LLC,

Petitioner,

v.

GINA MARIE HOUSKA,
Personal Representative of the
Estate of Jeffrey A. Houska, Deceased,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Missouri

BRIEF OF THE RESPONDENT IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner filed its claim in this probate case 2½ years after the decedent's death, and alleged as its excuse for sleeping on its claim that it received no actual notice of the decedent's death, or that probate proceedings had commenced; thus, Petitioner claims, denial of its claim violated Petitioner's right to actual notice under the Due Process Clause. This Court, however, has held that the actual notice requirement of the Due Process Clause does not apply to self-executing statutes of limitations. The Missouri Supreme Court prohibited the probate court from proceeding on Petitioner's claim due to application of MO. REV. STAT. § 473.444.1 (2000). One year after the date of decedent's death, this Section bars nearly[1] all claims regardless of whether a court commences administration on the decedent's estate within that year and regardless of whether the claimant has been given actual or constructive notice of the decedent's death or the need to file a claim. Due process is not offended by application of this statute, said the Missouri Supreme Court, since MO. REV. STAT. § 473.444.1, *supra*, is a self-executing statute of

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[1] The Missouri Supreme Court noted, "Section 473.444 does not bar recovery of 'costs and expenses of administration, exempt property, family allowance, homestead allowance, claims of the United States and claims of any taxing authority within the United States.' [Petitioner's] claim does not fall within any of the listed categories." Appendix to Petitioner's *Petition for a Writ of Certiorari* at 4a, n. 3.

limitations. In deciding whether to grant certiorari, this Court must address the following issues:

> Should this Court grant certiorari when *all other state courts of last resort* considering the issue have held, like the Missouri Supreme Court, that self-executing statutes barring claims filed more than one year (or some other shorter period) after a decedent's death do not violate the Due Process Clause?
>
> And, should this Court grant certiorari when its decision would directly affect only 16 state statutes?

For purposes of this *Brief of the Respondent in Opposition*, the Respondent adopts the facts as set forth in the Petitioner's *Statement of the Case*, but Respondent clarifies and corrects the Petitioner's *Statement of the Case* as follows:

1. The *Petition for Writ of Certiorari*[2] does not clearly state the timeline in this case: Jeffrey A. Houska died on November 2, 2006, the estate first published letters of administration on May 11, 2007, and Petitioner filed its claim in this case on May 5, 2009. *Appendix to Petition for Writ of Certiorari*[3] 2a. Thus, Petitioner filed its claim *2½ years* after the decedent died.

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[2] Abbreviated hereafter as "Cert. Pet."

[3] Abbreviated hereafter as "App."

2. The amount of the claim is only $1,498.75. App. 2a.[4]

3. The Jefferson County Probate Court – which had initially denied Petitioner's claim – reinstated the claim on the basis of this Court's decision in *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988). The Respondent filed her *Petition for Writ of Prohibition, or in the alternative, a Writ of Mandamus* with the Missouri Supreme Court, seeking an order prohibiting the probate court from proceeding with Petitioner's claim, and based her argument on the clear authority of MO. REV. STAT. § 473.444.1, *supra* – the self-executing statute of limitations. App. 2a. The case before the Missouri Supreme Court was not an "interlocutory appeal," as the Petitioner has alleged before this Court (see Cert. Pet. at 5), but an original proceeding in the Missouri Supreme Court seeking extraordinary relief. See App. 2a, 3a, 9a.

4. The Petitioner's edited excerpt from the Missouri Supreme Court's opinion fails to show how the Missouri Supreme Court meticulously followed this Court's opinion in *Pope* when analyzing the issue before it. The Missouri court reached its holding

[4] The Petitioner incorrectly listed the amount of the claim at App. 30a of its Petitioner for a Writ of Certiorari as $1,4908.75. An examination of the Appendix reveals this amount is clearly a typographical error, and the claim is $1,498.75.

through a careful analysis of *Pope*, and Respondent quotes the applicable portion in *toto*:

> [Petitioner] cites *Pope* in support of his contention that section 473.444 violates his right to due process by failing to require that the estate give him actual notice. In *Pope*, the Supreme Court considered an Oklahoma nonclaim statute that required the probate court to appoint an executor or executrix before notice was given to estates' creditors. *Id.* at 486. The notice triggered a two-month window in which creditors could bring claims against an estate. *Id.* Without court action – appointing the estate's executor or executrix – the two-month time bar would not be activated. The Supreme Court held that the "intimate involvement" of the state court constituted sufficient state action and implicated due process. *Id.*
>
> The Oklahoma statute at issue in *Pope* was not self-executing. The Supreme Court expressly distinguished the applicability of the Due Process Clause to self-executing statutes of limitation. The Supreme Court explained that with a self-executing statute of limitation, the state has no role other than the enactment of the statute. *Id.* The Supreme Court clarified that the "[s]tate's limited involvement in the running of the time period generally falls short of constituting the type of state action required to implicate the protections of the Due Process Clause." *Id.* at 487.

> In the present case, section 473.444 is self-executing. According to the Supreme Court's discussion of self-executing statutes in *Pope*, section 473.444 does not involve sufficient state involvement to implicate due process protections. As this Court has previously noted, section 473.444 "operates independently of any notice, judicial action or jurisdiction of the probate division to bar claims." *Hatfield v. McCluney*, 893 S.W.2d 822, 827 (Mo. banc 1995). The trial court is not "intimately" involved with the application of the one-year limitation in section 473.444. No state action is required to trigger the one-year period; the decedent's death automatically triggers the time period. Because section 473.444 is self-executing, Panagos' due process claim fails.

App. 6a-7a (footnote omitted).

5. Because the issue in the *Petition for Writ of Prohibition, or in the alternative, a Writ of Mandamus* before the Missouri Supreme Court was resolved purely as a matter of law, the parties have not fully developed the facts in this case. Petitioner claims that the record "establishes" that the Petitioner had no actual notice of the decedent's passing or that probate proceedings had commenced. Cert. Pet. at 16, n. 10. However, no court has ever made those specific findings, and the only evidence that Petitioner had no notice is a self-serving affidavit by James T. Panagos individually, filed in support of the *Motion for Rehearing* before the probate court. Further, no court has

heard evidence on whether Petitioner's identity was "reasonably ascertainable" by the Respondent, or whether sufficient funds even exist in the estate to pay the Petitioner's claim. Indeed, even if the Petitioner prevails before this Court, it might not succeed on its claim since, first, Petitioner is entitled to actual notice only if it is a "reasonably ascertainable" creditor. Then, it must show that sufficient funds remain in the estate to pay the claim under Missouri's statutory classification of claims. *See* MO. REV. STAT. § 473.397.

REASONS TO DENY THE WRIT OF CERTIORARI

I. This Court should deny the writ of certiorari because the decision of the Missouri Supreme Court does not involve an important question of federal law.

Although the grant of a writ of certiorari is one of sound judicial discretion, this Court has indicated that it will grant a writ of certiorari only for "compelling reasons" involving an "important federal question" by a state court of last resort. S. CT. R. 10(b). Petitioner claims that 32 other states and territories have statutes similar to MO. REV. STAT. § 473.444.1, *supra*, and claims that "this is an issue of national importance." Cert. Pet. 7. In fact, however, only a minority of states have statutes that function exactly

like Missouri's by cutting off claims one year (or some other shorter period) after a decedent's death;[5] the other statutes Petitioner cites either run for longer periods or are further distinguished in operation from Missouri's statute. This leads one to question whether this issue rises to the level of an "important federal question" (especially when one also considers that the claim itself is so small). Compare this with *Pope* in which this Court noted that nonclaim statutes like Oklahoma's "are almost universally included in state probate codes," and therefore created an important federal question on the issue of actual notice since all states have such statutes. 485 U.S. at 479.

This case is not "cert-worthy" as it lacks an important federal question. The Court should deny the writ of certiorari on this basis.

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[5] Colorado (West's C.R.S.A. § 15-12-803 – one year); Delaware (12 Del. C. § 2102(a) – 8 months); Indiana (West's I.C.A. 29-1-14-1(d) – 9 months); Maine (18 A M.R.S. § 3-308(A)(2) – 9 months); Maryland (Md. ESTATES & TRUSTS Code Ann. §§ 7-103(c)(1) and 8-103(a)(1) – 6 months); Massachusetts (ALM GL ch. 190B § 3-803(a) – one year); Minnesota (Minn. Stat. § 524.3-803(a)(3) – one year), Montana (Mont. Code Ann. § 72-3-803(1)(a) – one year); New Jersey (N.J. Stat. § 3B:22-4 – 9 months); New Mexico (N.M. Ann. Stat. § 45-3-803(A)(1) – one year); Ohio (ORC Ann. § 2117.06(C) – 6 months); South Carolina (S.C. Code Ann. § 62-3-803(a)(1) – one year); Tennessee (T.C.A. 30-2-307(a)(2) – one year); Utah (Utah Code Ann. § 75-3-803(1)(a) – one year); and Wisconsin (Wis. Stat. § 859.48(2) – one year).

II. This Court should deny the writ of certiorari because its decision will not resolve any conflict between state courts of last resort, as these courts are unanimous in holding that self-executing statutes of limitations on claims running from a decedent's date of death do not violate the Due Process Clause.

This Court, while noting that the grant of certiorari is a matter of judicial discretion, has indicated that it will grant a petition for writ of certiorari only for "compelling reasons," such as when "a state court of last resort has decided an important federal question in a way that conflicts with a decision of another state court of last resort . . . " S. Ct. R. 10(b). We note that *no* conflict exists between Missouri and other courts of last resort regarding the constitutionality of statutes substantially similar to Mo. Rev. Stat. § 473.444, *supra*. The state courts of last resort that have considered this issue are *unanimous* in holding that the actual notice requirements of the Due Process Clause do not apply to these statutes – *a fact the Petitioner concedes*. See Cert. Pet. at 23. In each of these cases, the courts applied the same reasoning as the Missouri Supreme Court and concluded that the statutes under review were self-executing statutes of limitations to which the actual notice requirement of the Due Process Clause has no application. *See In Re Estate of Ongaro*, 998 P.2d 1097 (Colo. 2000) ("Unlike the Oklahoma nonclaim statute declared unconstitutional in *Tulsa*, [West's C.R.S.A.] section 15-12-803(1)(a)(III) is self-executing. The one-year period

for presenting claims begins to run on the date of the decedent's death, not on the occurrence of an event requiring action by the state. *See* § 15-12-803(1)(a)(III). Accordingly, we find *Tulsa* inapposite to the case presently before us." 998 P.2d at 1105); *Estate of Decker v. Farm Credit Servs.*, 684 N.E.2d 1137 (Ind. 1997) ("[B]ecause the one-year provision [in West's I.C.A. § 29-1-14-1(d)] is self-executing, the federal Due Process Clause is not implicated. . . . Therefore, actual notice is not required prior to the termination of a claim. . . ." 684 N.E.2d at 1139-1140); and *Ohio Cas. Ins. Co. v. Hallowell*, 94 Md. App. 444, 617 A.2d 1134 (1993) (" . . . [Md. Code Ann., Est. & Trusts, § 8-103(a)(1) (1991)] provides that the bar runs automatically from the time of death. The state court is not 'intimately involved.' In fact, no action by the state court is necessary to activate the time bar. It is not dependent on the opening of an estate, the appointment of a personal representative, the providing of notice, or the filing of notice. Death commences the running of the time period and the passing of that period, regardless of state action. Accordingly, we conclude that the statute at issue here is a self-executing limitation statute. Thus, due process concerns are not implicated, and the statute is not unconstitutional." 617 A.2d at 1138). *See also May v. Illinois National Insurance Company*, 771 So.2d 1143 (Fla. 2000) (reaching the same conclusion on a two-year self-executing statute of limitations on probate claims.)

Likewise, state intermediate courts of appeals and a federal district court have concluded that statutes

barring claims after a stated period commencing on the decedent's date of death are self-executing statutes of limitations to which the actual notice requirement of the Due Process Clause does not apply. *See Burnett v. Villaneuve*, 685 N.E.2d 1103 (Ind. App. 1997); *Roddy v. Hamilton County Nursing Home (In Re Estate of Key)*, 1999 Tenn. App. LEXIS 201 (Tenn. Ct. App. March 24, 1999); *Society Nat'l Bank v. Johnson*, 1997 Ohio App. LEXIS 5682 (Ohio Ct. App. Cuyahoga County, December 18, 1997); *Fifth Third Bank v. Gottlieb*, 1997 Ohio App. LEXIS 3815 (Ohio Ct. App. Wood County August 29, 1997); *Grijalva v. Gulf Bank*, 2011 WL282754 (S.D. Fla. 2011). Indeed, not a single judge on any appellate panel considering this issue has agreed with the Petitioner's reasoning.

Every state appellate court and the sole federal district court considering this issue have held that no state action attaches to the enactment of a claims period in a self-executing statute like MO. REV. STAT. § 473.444.1, *supra*. Unlike *Pope*, which involved a conflict between state courts of last resort regarding notice and nonclaim statutes, 485 U.S. at 483-484, there is no controversy in the lower courts here that a decision by this Court would resolve. Clearly, this case is not "cert-worthy," and the Court should not act on this issue unless a controversy arises between the state courts of last resort.

III. The Missouri Supreme Court's decision does not conflict with relevant decisions of this Court.

Although the decision to grant or deny a writ of certiorari is a matter of sound judicial discretion, this Court has indicated it will grant certiorari only for "compelling reasons" such as when the lower court has "decided an important federal question in a way that conflicts with the relevant decisions of this Court." S. Ct. R. 10(c). Not only is the Missouri Supreme Court's opinion in accord with the relevant decisions of this court, the court correctly relied on the reasoning of *Pope* in rendering its judgment that the actual notice requirements of the Due Process Clause do not apply to Mo. Rev. Stat. § 473.444.1, *supra*.

In *Pope*, this Court considered an Oklahoma nonclaims statute that required, when the personal representative opened an estate, that the personal representative give notice to creditors "that they must present their claims to the executor or executrix within two months of the date of first publication. As for the method of notice, the statute require[d] only publication. . . ." 485 U.S. at 481. In deciding that the Oklahoma procedure violated the Due Process Clause, this Court noted: (1) the probate court's "intimate involvement" through the probate proceeding – notably the court's activation of the statute's time bar by appointing the personal representative – constituted state action subject to the constraints of the Due Process Clause; and (2) because state action was involved, due process required that the state give actual

notice to any creditor whose identity was known or "reasonably ascertainable" by the personal representative, citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) and *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) as authority.

But, by the terms of the opinion, the actual notice requirements of *Pope* have *no* application to a self-executing statute of limitations like MO. REV. STAT. § 473.444, *supra*. Section 473.444.1 makes it immaterial whether the personal representative gives actual or constructive notice to a creditor. If a creditor fails to file its claim with the probate court within one year of the decedent's date of death, and neither the claim nor the creditor is part of a very narrow class excluded from application of the statute, that claim is "forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedent." *Period*. No state action is required to bar the claim. Accordingly, the statute is a self-executing statute of limitations, and this Court made its holding in *Pope* expressly inapplicable to such self-executing statutes: "We . . . have no occasion to consider the proper characterization of non-claim statutes that run from the date of death, and which generally provide for longer time periods, ranging from 1 to 5 years." 485 U.S. at 488. Indeed, this Court specifically noted in *Pope* that a self-executing statute of limitations does not deny due process under *Mullane* or *Mennonite*, even if the creditor receives no notice whatsoever:

> [D]ue process does not require that potential plaintiffs be given notice of the impending expiration of a period of limitations. . . .
>
> * * *
>
> The State's interest in a self-executing statute of limitations is in providing repose for potential defendants and in avoiding stale claims. The State has no role to play beyond enactment of the limitations period. While this enactment obviously is state action, the State's limited involvement in the running of the time period generally falls short of constituting the type of state action required to implicate the protections of the Due Process Clause.

485 U.S. at 486, 486-487. In *Texaco, Inc. v. Short*, 454 U.S. 516 at 536, 102 S.Ct. 781 at 796, 70 L.Ed.2d 738 (1981), this Court considered a similar issue. There, this Court upheld against challenge under the Due Process Clause an Indiana statute providing that severed mineral interests not used for a period of 20 years would lapse and revert to the surface owner unless the mineral owner filed a statement in the applicable county office. The appellant-mineral owner claimed that absence of specific notice prior to this lapse rendered the statute unconstitutional under the Due Process Clause. In rejecting this argument, the Court noted,

> That claim has no greater force than a claim that a self-executing statute of limitations is unconstitutional. *The Due Process Clause*

> *does not require a defendant to notify a potential plaintiff that a statute of limitations is about to run*, although it certainly would preclude him from obtaining a declaratory judgment that his adversary's claim is barred without giving notice of that proceeding.

454 U.S. at 536 (emphasis added).

Petitioner seeks to overcome this clear constitutional precedent by arguing it was merely *dictum* when this Court announced in *Pope* that state action does not arise in the mere enactment and running of a self-executing statute of limitations. Petitioner, however, ignores that this Court built the *Pope* opinion around the distinction between a self-executing statute of limitations on claims – the enactment and running of which does not constitute state action – and the probate court's "intimate involvement" in the running of the nonclaim statute – which the court said does involve state action. This Court predicated its decision in *Pope* upon this clear distinction. Furthermore, even assuming *arguendo* that the language in *Pope* is *dicta*, this Court's holding in *Texaco* is not *dicta*, and the decision of the Missouri Supreme Court is consistent with not only *Pope*, but also the clear precedent of *Texaco*.

Petitioner, however, asserts that the holding of *Texaco* should only apply to general statutes of limitation because the event that causes it to commence is, or should be, known to the person affected. Cert. Pet. at 15-17. Here, according to Petitioner, "Respondent seeks to defeat Panagos' claim based on the

expiration of a deadline triggered by an event, the death of her father, known, perhaps, only to her," and so due process should apply. *Id.* at 16. Petitioner does not say how any state action is involved in this argument. Instead, Petitioner asserts that the Court in *Texaco* did not look for state action to resolve this issue, but instead imposed a "balancing of interests" to determine what process was due under the statute. *Id.* Apparently, under Petitioner's novel reading of *Texaco*, this balancing tips in favor of a creditor under MO. REV. STAT. § 473.444, *supra*, since it "would not likely be aware of" the decedent's passing, unlike the owner of a severed mineral interest, who would know, or should know, that his mineral interest would expire. *Id.*

Respondent does not read *Texaco* to apply any "balancing of interests" test; indeed, the phrase appears nowhere in the opinion. But even if a "balancing of interests" test did exist, Petitioner would not prevail. This Court noted in *Texaco* that the owner of a mineral interest is presumed to know the law. 454 U.S. at 518. Likewise, a creditor in Missouri is presumed to know that, if its debtor dies, the creditor then has a year to pursue its debt. Surely, a responsible creditor would seek to learn before the passage of a year why the decedent had not paid his or her bill, and, upon investigation and discovering the debtor had died, would take appropriate actions to protect its

interest.[6] *See Burnett v. Villaneuve*, 685 N.E.2d 1103 at 1112. Even if one accepts Petitioner's new "balance of interest" theory, the scales do not tip in a creditor's favor especially where, as here, the creditor did nothing to protect its claim for 2½ years.

The Missouri Supreme Court's decision is consistent with the decisions of this Court. The Court should deny the petition for a writ of certiorari.

IV. Despite Petitioner's contention, there is no "'self-executing' fallacy" for this Court to resolve.

Starting at p. 20 in a section it entitles "The 'Self-Executing' Fallacy," Petitioner seeks to overcome this clear legal precedent by asserting the only support it can find for its argument that a state's enactment of a self-executing state of limitation is "state action" under the Due Process Clause. That support comes not from the learned judgments of appellate courts that decide real life cases – as shown above, these court's have uniformly ruled against Petitioner's position – but instead from a cleverly-titled 1990 law review article by Professor Mark Reutlinger, *State*

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[6] In Missouri, a creditor can file a claim with the probate court if a personal representative has opened an estate, or, if neither the party designated as personal representative nor any other interested person opens an estate, the creditor can open the estate twenty days following the debtor's death and then assert its claim before the probate court. *Hatfield v. McCluney*, 893 S.W.2d 822 at 826 (Mo. banc 1995).

Action, Due Process, and New Nonclaim Statutes: Can No Notice Be Good Notice If Some Notice Is Not?, 24 REAL PROP. PROB. & TR. J. 433 (1990).[7]

In his article, Reutlinger finds state action where no court has found it. He seizes upon this Court's "concession" in *Pope* that enactment is state action, but then seeks to wiggle out from under *Pope*'s corollary rule that "enactment alone generally is insufficient to implicate due process." Reutlinger, *supra*, at 448. Rather than support these legal gymnastics by analyzing the text of *Pope*, Reutlinger changes the subject from *Pope* to this Court's decision in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978). In *Flagg Brothers*, this Court upheld the constitutionality of a Uniform Commercial Code provision, which allowed a warehouseman to enforce a lien upon repossessed goods by re-selling those goods. This Court held that the state-allowed re-sale provision did not constitute state action, and thus, the plaintiff did not possess a federal due process claim. Reutlinger attempts to explain why the enactment of the UCC did not implicate due process, but would in the case of self-executing statutes of limitation like MO. REV. STAT. § 473.444, *supra*. The distinction, Reutlinger claims, is choice: under the UCC provision, the law *permits* a warehouseman to re-sell property, but does not compel him to do so. Therefore,

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[7] A case comment – *Comment: Notice and the Missouri Probate Nonclaim Statutes: The Lingering Effects of Pope*, 59 MO.L.REV. 187 (1994) – parrots Reutlinger's musings.

no state action exists in those circumstances to implicate the Due Process Clause. On the other hand, Reutlinger argues that the state is far more deeply implicated in the deprivation of property under a self-executing statute of limitation because the state, "in enacting a [self-executing statute of limitation] has not offered private parties a choice whether to cut off claims at the end of one year; it has mandated that all claims be cut off, regardless of any action or inaction by any private party." And therein lies state action, or so he claims. Reutlinger, *supra*, at 448.

But Reutlinger's argument is, in a word, specious. First, his observation ignores that *all* ordinary statutes of limitation "mandate that all claims be cut off;" therefore, his observation *directly contradicts* this Court's exemption of those claims in the *Pope* and *Texaco* cases from due process review. Second, the state action issue in *Flagg Brothers* was not whether the statute's enactment was state action, but rather if the warehouseman who acted pursuant to the statute was, under the circumstances, an agent of the state. 436 U.S. at 149-151. The court never directly considered the role that enactment played in creating state action. Instead, the primary thrust of the opinion in *Flagg Brothers* was that the power delegated by the state to the private party did not involve a function reserved exclusively to the State, and was not state action.

Petitioner tries to create a fallacy that does not exist using a cleverly titled law review article. Indeed, no state court has found the "'self-executing'

fallacy" that Petitioner and Reutlinger have invented. This Court's ruling in *Pope* is clear and cogent on what is, and what is not, state action, and the Missouri Supreme Court applied that clear precedent here. No "fallacy" exists for this Court to correct.

CONCLUSION

Respondent prays this Court enter its order denying the Petitioner's petition for a writ of certiorari to the Missouri Supreme Court.

Respectfully submitted,

THOMAS J. RAY, JR.
Counsel for Respondent

March 2011